

**Caplin & Drysdale**  
ATTORNEYS

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June 13, 2002

Jonathan Levin  
Senior Attorney  
Office of the General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

AOR 2002-09

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RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

Dear Mr. Levin:

Thank you for the attention you have given to the advisory opinion request on behalf of my client, Target Wireless. This letter serves to clarify some of the questions you have raised.

You raised the question of whether a SMS message may be continued. A single SMS message may be not continued. Although carriers may represent to subscribers that multiple SMS messages may be continued or continuous, this is a misnomer. Subscribers are separately billed for the transmission of two or more SMS messages so that "continuous messages" are really treated as two or more distinct and separate communications. In addition, if a carrier sends two messages intending for them to be connected, it is more than likely that the second message will not be received in tandem with the first message and rather, another carrier's message will be received somewhere between the original carrier's first and second message. Furthermore, as traffic on networks increases, so does the delay in timely reliable delivery of SMS communications which will make the likelihood that two messages sent simultaneously will not be received concurrently even more likely. A subscriber will be even more confused if he receives one SMS text message promoting a candidate and a separate SMS message with a disclaimer when each is received at different times with no apparent logical connection between the original communication and the disclaimer.

You also inquired whether the content text (rather than the advertisement text) of the SMS message (the news information, sports scores, etc.) is included in the 160 characters. The entire text message must be within 160 characters, including the content of the message. The sponsor of the political advertisement has no control whatsoever over the length of the content text in the message. The content provider controls the length of the content text. How many characters are left for a political advertisement could depend on something as insignificant as whether a sports team name is the Suns or the Timberwolves. The Commission has created exceptions for items upon which the disclaimer cannot be conveniently printed. Here too, the disclaimer cannot be conveniently printed because it is not within the sponsor's control to use enough of the 160 characters of the SMS message to send an advertisement and disclaimer. Hence, we are seeking an opinion by the Commission that recognizes that sponsors cannot control the number of characters on a SMS message that remain for its political advertisement.

and thus, allows them to send advertisements without disclaimers, as the Commission has already granted for bumper stickers, pins, buttons, pens, and other small items upon which the disclaimer cannot be conveniently printed.

Please do not hesitate to contact me with any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Diana Hartstein", with a long horizontal flourish extending to the right.

Diana Hartstein

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FEDERAL MAIL ROOM

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May 14, 2002

Bradley Litchfield, Esq.  
Associate General Counsel for Policy  
Office of General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

Re: Request of Advisory Opinion

Dear Mr. Litchfield:

On behalf of our client, Target Wireless, (a South Dakota corporation, registered as Fancaster, Inc.) we are requesting an advisory opinion, pursuant to 11 C.F.R. § 112.1(a) applying 2 U.S.C. § 441d and its exceptions at 11 C.F.R. § 110.11(a)(6) to the distribution of political advertising to subscribers of wireless digital telephones (through the transmission of a digital message which appears as printed text messages on the cellular telephone's screen). Specifically, we are requesting an opinion that advertising on wireless digital telephones is analogous to advertising on the types of items (bumper stickers, pins, water towers, etc.) that are exempt from the disclaimer requirement on grounds of impracticability.<sup>1</sup>

**I. Introduction**

**A. Target Wireless:**

Target Wireless is recognized as one of the leading "best practices" firms working in wireless media. Target Wireless collaborates with brand managers, chief marketing officers, advertising agencies and integrated marketing organizations to design and execute advertising employing the wireless space in new media.

Target Wireless is engaged in the development and implementation of wireless advertising initiatives and promotional sponsorships of content that is distributed through wireless telecommunications networks and Internet service providers to wireless subscribers of PCS digital telephones. Target Wireless has standing to request this advisory opinion pursuant to C.F.R. 112.1(b) because in 2002 or thereafter, Target Wireless plans to undertake one or more of the following activities specific to the delivery of a hard-to-reach mobile audience:

<sup>1</sup> Currently, there are no FCC regulations that address the issue of advertising on wireless phones through digital characters. This Advisory Opinion Request does not involve audio telephone messages.

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- 1) As a broker<sup>2</sup> of wireless advertising between political parties or candidates and content providers (networks or broadcasters such as CNN, FOX, etc.),<sup>3</sup> receiving a commission for placing a wireless advertisement.
- 2) As a broker between content providers and wireless networks (Sprint, AT&T, etc.) to facilitate the relationship described above. For example, in order for news entities (CNN, FOX, etc.) to send content to subscribers through the subscriber's wireless digital telephone, the news provider must have a relationship with a wireless network. Target Wireless can broker the arrangement between the provider and the wireless network.
- 3) As an agent for candidates seeking federal office. Target Wireless has had discussions with political candidates about wireless advertising, but has been unable to proceed further because of the uncertainty of the application of the FEC's disclaimer exemption to such communications.
- 4) As an agent to other third-party organizations<sup>4</sup> interested in promoting certain candidates for federal office.

One of Target Wireless's primary revenue streams is from wireless advertising and sponsorships. Although Target Wireless does not have any clients currently for which it performs this service (i.e., sending wireless political advertising to subscribers of wireless digital telephones), it had been contacted by candidates and political parties, to inquire about the possibility of this service. Target Wireless is currently unable to provide brokerage for this service because of the uncertainty of the permissibility to send wireless political advertising without including a disclaimer. As detailed below, a disclaimer on wireless advertising would render the communication impractical. Given that most candidates would be uneasy about engaging in political advertising that could potentially be found to be in violation of the advertising regulations, it is unlikely that Target Wireless will be able to secure clients for whom to provide this service without having explicit advice from the Commission.

#### B. Disclaimer Requirement for Political Communication

Generally, a communication that expressly advocates the election or defeat of a candidate through any newspaper, poster, direct mailing, or other form of general public political advertising must be accompanied by a disclaimer.<sup>5</sup> The disclaimer must be presented in a clear and conspicuous manner to give the reader adequate notice of the identity of persons who paid for and/or authorized the communication.<sup>6</sup> Communications paid for by a party committee pursuant to § 441a (d) are required to have a disclaimer that identifies the committee that makes the expenditure as the person who paid for the communication.<sup>7</sup>

<sup>2</sup> A broker in the political advertising context is defined as a third party acting to facilitate distribution of communications pertaining to a candidate, political initiative, or political party.

<sup>3</sup> Consumers would have the option of signing up for specific content information from networks, including politics, sports, news, etc. Only those subscribers that specifically signed up for political content updates would receive these messages.

<sup>4</sup> Third party organizations can be any group interested in promoting a candidate, political initiative, or political party, such as NEA, NRA, RNC, DNC, etc.

<sup>5</sup> 2 U.S.C.A. § 441d (a).

<sup>6</sup> 11 C.F.R. § 110.11(a)(1).

<sup>7</sup> § 110.11(a)(2).

The Commission's Regulations recognize exceptions to the disclosure requirement for "bumper stickers, pins, buttons, pens, and other small items upon which the disclaimer cannot be conveniently printed" and "skywriting, water towers, wearing apparel or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable."<sup>8</sup> These exemptions are based on the fact that if these items were required to present a disclaimer, it would consume nearly as much space as the political message itself, thus rendering the purpose of the advertisement or message virtually null.

## II. Discussion

### A. Short Messaging Service

In the domestic U.S. marketplace, Short Messaging Service ("SMS") is the dominant delivery technology that is employed by all wireless carriers. SMS works as follows: a wireless subscriber has the option of subscribing to a content-based information system that permits the delivery and receipt of content and email messages which are configured as short messages on the liquid crystal display ("LCD"), which serves as the digital screen on each wireless telephone. Examples of content include politics, news, sports, etc. Providers offer consumers the option of lowering their monthly subscriber fee by opting in to receive sponsorship and related promotions as part of their service plan.

When the content, sponsored by a candidate, reaches the LCD on a wireless subscriber's phone, it will be linked to a political advertisement if the subscriber has opted into that service. The content could be a sports or news update, whereas the political advertisement would name a political party, candidate, etc. that was paying for sending the content message to the subscriber. Any number of organizations would be able to provide this service, including wireless carriers, wireless manufacturers, individual websites (such as "www.long\_union\_name.com"), the content provider (Amalgamated International Press Agency, Inc.), etc. The sponsorship is linked to the content by being placed before, in the middle, or after the primary news. For example:

Wizards 90 Knicks 80  
Lakers 99 Jazz 87  
Kings 99 Suns 89  
Nets 102 Bucks 89

Padres 6 Braves 5  
Dodgers 3 Marlins 11  
Cardinals 10 Reds 8

Kids are Winners with [Smith]

or

<sup>8</sup> § 110.11 (a)(6)(i) - (ii).

The National Association of [Industry] reminds you to visit the Annual Recreation Show at the D.C. Convention Center.

For a Strong America -- Re-elect [Smith]

The political advertisement would be displayed each time the subscriber checks the particular content (e.g. news, sports, etc.) to which it subscribes. The length of time a message is displayed varies depending on how long the subscriber presses the key to scroll through each message (if the subscriber's phone is not programmed to receive messages, one will never be displayed). With most digital phones, the subscriber can delete the message right away. Also, most subscriber SMS mail boxes have pre-set settings on the telephone that provide for content on the screen to be automatically "displaced" (i.e., replaced) as new updates are sent by the content provider and/or carrier. This means any content on the screen would be replaced as soon as there is new content being sent. However, subscribers can (with most models) override these settings and keep or maintain news or information cumulatively just as an e-mail user may choose not to delete any or some e-mail messages.

The average character capacity for a digital telephone's screen enabled to receive SMS text messages is approximately 160 characters.<sup>9</sup> A character is defined as a letter, symbol, space, punctuation mark or single digit. Therefore, the advertisements distributed via SMS must be compressed into 160 characters leaving virtually no room on the digital telephone's screen for a disclaimer. The 160 character limitation remains constant, even if a particular telephone's screen has the capacity for more characters or more lines of text. Therefore, the screen or character capacity of any particular digital telephone is irrelevant for the purposes of this request. For example, merely stating "Paid for by the Republican National Committee" takes 45 characters -- more than 25% of the total available space. A longer statement such as, "Paid for by the Fisherman's Union PAC and Not Authorized by Any Candidate or Candidate's Committee" takes 98 characters.

The Commission determined that disclaimers required for televised communication are considered clear and conspicuous if they appear in "letters equal to or greater than four (4) percent of the vertical picture height . . ."<sup>10</sup> The disclaimer that would be required for advertising on wireless digital telephone screens would, as described above, take up a significant portion of total screen, much more than the mere 4% the Commission determined was acceptable for television screens. Even the shortest of possible disclaimers -- "Paid for by Smith for Congress" -- would consume 18% of the available screen characters.

As it stands, the disclaimers required by § 441d (without a specific exemption for telephone screen digital advertising) constructively estop new media agencies, wireless providers, and candidates for public office from utilizing wireless media as a component of the media mix when implementing wireless advertising initiatives for candidates.

<sup>9</sup> See October 4, 2001, Dow Jones Newswire story attached at Exhibit A.

<sup>10</sup> § 110.11(a)(5)(iii).

B. Applying Disclaimer Exception to Short Messaging Service

The Commission has not addressed the issue of whether the disclaimer requirements apply to wireless digital advertising. Given that there is very limited space with SMS delivery to digital telephones, it is extraordinarily similar to exceptions already provided for at § 110.11(a)(6). To require that a disclaimer accompany wireless advertising is "impractical" because the limited space available to both assert the political message and a disclaimer on the wireless telephone's screen would render the already limited advertisement/message void. If the Commission determines that the exceptions at § 110.11(a)(6) include digital telephones utilizing SMS delivery technology, candidates for public office would be able to communicate their respective messages to hard-to-reach mobile voters.

If the Commission is concerned that recognizing the impracticability of a disclaimer on digital telephone advertising would adversely affect public disclosure, there are reasonable alternatives the Commission could explore. For instance, it may be feasible to require that all political advertisements carry a message, either in the way of a website or telephone number that would provide a link to the sponsor's identification. For instance, after the political message, a line could read "1-800-555-5555" or "www.sponsor.com." Persons reaching the phone number or the website could find out the identity of the sponsor.

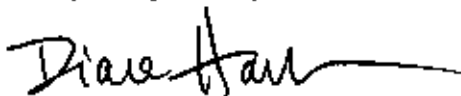
III. **Conclusion**

The convenience of use of mobile telecommunications has led to such telephones becoming a ubiquitous feature of modern life. Because wireless devices can receive and communicate messages to a massive mobile audience with consistent regularity, wireless can be used (only with the consent of the subscriber, as noted above) as an advertising tool that is capable of reaching a unique, mobile audience for which traditional cable and modem-based applications are not well-suited to deliver.

Accordingly, on same grounds as the exceptions provided in § 110.11(a)(6)(ii), ("that the inclusion of a disclaimer would be impracticable,") Target Wireless respectfully requests that the Commission render an advisory opinion determining that wireless advertising over digital telephones qualifies as a means of displaying an advertisement of such nature that the inclusion of a disclaimer would be impractical. Target Wireless understands that technology will improve and is subject to new platforms for delivery of content. However, because SMS is the dominant delivery platform today and the foreseeable future, we request the Commissioner's opinion be limited to the SMS platform.

Please do not hesitate to contact me should you require any additional information.

Very Truly Yours,



Diana Hartstein  
Caplin & Drysdale

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Thursday October 4, 3:01 AM

**AWSJ(10-4) Ad Firms Labor To Refine Wireless SMS Ads In Asia**By Shu Shin Luh  
Staff Reporter

SINGAPORE -- Imagine this: text message arriving over your mobile phone: "Thank me it's Friday. Signed, God."

Or this: "Coming over to my place tomorrow. God."

What would you do?

Well, Singaporeans responded. Some wanted to know if God was really sending these messages or if this was a sick joke. Others confessed their sins to God.

The people operating in the name of God are the 150 Singapore churches that form the Love Singapore coalition. The group hired Ogilvy Interactive, the online advertising arm of Ogilvy & Mather, to design an outreach campaign for new members using the wireless short messaging system, also known as SMS.

In Asia, 5.6 billion text messages are sent a year, according to market research firm Mobile Streams. In Singapore, mobile phone users can converse with friends and family in text messages limited to 160 characters - a much cheaper way of talking than over the phone, especially for teenagers and foreign workers. In the Philippines, text messaging was said to be a key tool used to mobilize "people power" rallies that ousted President Joseph Estrada in January.

But marketing via SMS? Well, it is still driven largely by promotional marketing from telecom operators offering all subscribers new services and options. After all, they are the ones with the data banks. So far, however, these phone-company-initiated SMS promotions have largely gone the way of junk e-mail, advertising consultants say.

"I don't think it's the fault of the medium itself - it never is," says Kent Wertine, chief



## AWSJ(10-4) Ad Firms Labor To Refine Wireless SMS Ads In Asia

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executive officer of Ogilvy Interactive Asia. "It's almost always the fault of the market who hasn't figured out how to use the medium with finesse."

Advertising firms are only starting to take advantage of SMS as a marketing tool. Few think SMS marketing can become a stand-alone tool for advertising products and brands. But it is effective in creating buzz, especially among teens, to complement a larger campaign that includes traditional television and print advertisements.

In June, Coca-Cola launched an SMS campaign in Singapore to promote its new fruit juice, Qoo. The drink had already gained tremendous popularity in its home market, as well as Japan and Korea, thanks to the success of the blue-skinned, balloon-headed Qoo character. Coca-Cola sent a picture message via SMS to 500 people showing the animated character, hoping they would pass it on to their friends via SMS.

"We chose people who were teenage role models. . . . They may be the captain of the football team or a teenage actor," says June Kong, Coca-Cola's spokeswoman in Singapore. "We first get them to like the drink and then they would forward the character to their friends. Our sales team also got the character and sent it to their friends."

Within nine weeks, Qoo became the No. 1 juice drink in Singapore, thanks to this guerrilla marketing, Coca-Cola says. About half a million mobile users in Singapore have received the Qoo character. "We knew we wanted to target teenagers with this brand," Ms. Kong says. "I think SMS speaks to this group of people especially when traditional methods like TV campaigns are less effective."

In Hong Kong, phone companies partner with retail stores to send out discount coupons to their mobile subscribers. By showing the SMS message on their mobile phones, shoppers can then redeem the discounts. But like unwanted e-mails that keep coming until the receiver says no, the SMS information is often forced onto the consumer, says Kenny Wong, general manager of Beyond Interactive, a Grey Worldwide division focused on digital marketing. "In terms of targetability, it really depends on the telcos and whether they are filtering certain kinds of data like sex or age. Still, the information isn't updated very often."

There is little targeting in Singapore. Phone companies send out messages to their subscribers to inform them of discount international calling rates - with mixed results. "I get these offers for 10% off calls to Madagascar. I've never called Madagascar and I never will," says Graham Kelly, regional creative director for Ogilvy. "They should look at my phone bill and my calling patterns and realize if they're offering discounts to the U.S., the U.K. and Hong Kong, I'd probably be excited."

Mr. Kelly says the God campaign is a departure from existing SMS marketing initiatives because mobile phone users have to subscribe to receive messages from God. Ogilvy recruited its first subscribers at church congregations in Singapore. Each church member volunteers one friend or relative who might be interested in finding out more about church activities. They send an SMS to God with their friends' phone number.


God then sends a message to the friends asking if they would like to hear more. "The way we're doing it, you have to ask for it to get it, you have to subscribe to it," Mr. Kelly says. "If you say no, you don't want to hear from us, we don't talk to you again."

According to Ogilvy, one in four people who received the coalition's invitation to receive

## AWSJ(10-4) Ad Firms Labor To Refine Wireless SMS Ads In Asia

more text messages agreed to subscribe, and they total up to about 13,000 subscribers. That compares with an industry average response rate of 2% to direct mail advertising.

SMS "is clearly an effective tool to communicate and develop relationships with your consumers," Mr. Kelly says. "But if we misuse it - that is if we just blindly send messages to everyone - then we can kill this tool before it even becomes mature."

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Jonathan Levin  
03/05/2002 03:09 PM

To: TP@capdale.com  
cc: Bradley Litchfield/FEC/US@FIC

Subject: Your Letter on Behalf of Target Wireless

This office has reviewed your letter on behalf of Target Wireless. We have a number of questions and concerns pertaining to standing, clarity, and details about the communications.

First, as to standing, we note that no mention is made of any actual campaign or political committee clients, or of the existence of any such current clients with respect to the services provided by Target Wireless. See Advisory Opinions 1999-36 and 1999-22. In addition, the standing issue would be understood more clearly if the terminology in the five potential activities by Target Wireless (appearing at the bottom of page one and the top of page two of your letter) were explained. Specifically, you should explain the meaning of the terms "broker," "advertising initiatives," "agent," "sponsor," and "other third party organizations." Please provide an example of each of the five activities. (These would be descriptive illustrations of each of the five activities.) In providing the examples, please explain the types of actors in the process and where Target Wireless would fit in.

Please also clarify the sentence on page 2 which states: "When the content, sponsored by a candidate, reaches the LCD on a wireless subscriber's phone, it will be linked to a political advertisement." Explain the distinction between the content that is sponsored by a candidate and a political advertisement." Explain what is meant by the "linking" of the content with the political advertisement.

Please clarify the circumstances under which the candidate content would be displayed. State the circumstances under which the content appears on the screen and for how long it appears, e.g., for a second, for a few seconds, until the user clicks it off. State whether the phone user controls when, and for how long, the message will be displayed, and state how such control is exercised.

You have stated that the average character capacity for a digital telephone's screen is 160 characters. Please state the extent of the range currently available on the market as to numbers of characters on a screen. State also the average screen size, measured diagonally in inches, and the extent of the range currently available on the market as to screen sizes. State whether the messages can be multi-screen messages, i.e., that the message is begun on one screen and then continues on a successive screen or screens. State how many successive screens this display can entail.

This office has made these requests for information and clarification in order to ascertain whether Target Wireless currently has standing to ask for an opinion on the described activities and, in view of the highly technical nature of your description, to more fully understand the proposal and the processes involved. Upon receipt of your responses, this office will give further consideration to your proposal. If you have any questions, please contact me at the above e-mail address or at 694-1650.